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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

KATRINA PERKINS STEINBERGER,  
as Executor of the Estate of Charles A.  
Perkins, deceased, and individually,

Plaintiff,

v.

INDYMAC MORTGAGE SERVICES, a  
division of ONEWEST BANK, F.S.B., a  
Federally Chartered Savings Bank;  
DEUTSCHE BANK NATIONAL  
TRUST COMPANY, as Trustee of the  
INDYMAC INDX MORTGAGE LOAN  
TRUST 2005-AR14; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC., a Delaware  
Corporation; OCWEN LOAN  
SERVICING, LLC, a Limited Liability  
Company; KEELEY KRISTINE SMITH,  
an Attorney licensed with the Arizona  
State Bar; JOHN AND JANE DOES 1-  
1000, XYZ CORPORATIONS 1-15;  
ABC LIMITED LIABILITY  
COMPANIES 1-15; and 123 BANKING  
ASSOCIATIONS 1-15,

Defendants.

Case No. 2:15-cv-00450-ROS

**MOTION TO DISMISS  
COUNTERCLAIM**

**OF COUNTERDEFENDANTS  
KATRINA PERKINS STEINBERGER,  
AS EXECUTOR OF THE ESTATE OF  
CHARLES A. PERKINS, AND  
INDIVIDUALLY**

DEUTSCHE BANK NATIONAL TRUST  
COMPANY, as Trustee for INDYMAC  
INDX MORTGAGE LOAN TRUST 2005-  
AR14, MORTGAGE PASS-THROUGH  
CERTIFICATES SERIES 2005-AR14,

Counterclaimant,

v.

1 KATRINA PERKINS STEINBERGER, as  
2 Executor of the Estate of Charles A.  
Perkins, deceased, and individually,

3 Counterdefendants.  
4

5 DEUTSCHE BANK NATIONAL TRUST  
6 COMPANY, as Trustee for INDYMAC  
7 INDX MORTGAGE LOAN TRUST 2005-  
AR14, MORTGAGE PASS-THROUGH  
CERTIFICATES SERIES 2005-AR14,

8 Third-Party Plaintiff,

9 v.

10 SAGUARO DESERT TRUST; KATRINA  
11 PERKINS STEINBERGER, as Exectuive  
Trustee of Saguaro Desert Trust; M&I  
12 MARSHALL & ILLSLEY BANK, a  
Wisconsin Banking Corporation;  
13 QUALITY LOAN SERVICE  
CORPORATION, a California  
14 Corporation; RANCHO ALTA VIDA  
HOEOWNERS' ASSOCIATION, an  
15 Arizona Non-Profit Corporation; DOE  
INDIVIDUALS OR ENTITIES 1-10;  
16 UNKNOWN HEIRS AND DEVISEES OF  
CHARLES A. PERKINS, DECEASED,

17 Third-Party Defendants.  
18  
19

## 20 I. INTRODUCTION.

21 Pursuant to Rule 12(b)(6) Fed. R. Civ., Counterdefendants Katrina Perkins  
22 Steinberger, as Executor of the Estate of Charles A. Perkins, deceased, and individually  
23 ("Steinberger"), hereby files her motion to dismiss the counterclaim for judicial  
24 foreclosure.<sup>1</sup> The counterclaim must be dismissed with prejudice, as the statute of  
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26 <sup>1</sup> This Motion is filed without prejudice to Steinberger's position that this entire suit  
27 should be remanded to Superior Court and that there is no diversity jurisdiction, as argued  
28 in her Motion to Remand (Doc. 23) filed April 2, 2015. Should this matter be remanded,  
the Superior Court will be asked to rule on this Motion.

1 limitations has run on any individual or entity's ability to enforce the Adjustable Rate Note  
2 or Deed of Trust in this matter.

## 3 4 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

5 The disputes between the parties to this lawsuit arise out of the terms of an  
6 Adjustable Rate Note (the "Note"), dated May 25, 2005, and a Deed of Trust also dated  
7 May 25, 2005, which purports to secure the Note. The Note contains an original principal  
8 balance of \$532,000.00 with an adjustable interest rate; the rate at loan initiation was 1%.  
9 *See* Note, attached as Exhibit 1 to the Second Amended Complaint ("SAC"), Doc. 12-5 at  
10 55-58, and Deed of Trust, attached as Exhibit 2 to the SAC, Doc. 12-5 at 60-72.

11 According to the Statement of Breach or Non-Performance dated February 20,  
12 2009, payment default on the Note occurred on November 1, 2008. *See* Exhibit 14 to  
13 SAC, Doc. 12-6 at 75.

14 The Deed of Trust requires that the Note be accelerated prior to initiating  
15 foreclosure:

16 Lender shall give notice to Borrower prior to acceleration following  
17 Borrower's breach of any covenant or agreement in this Security Instrument  
18 .... The notice shall specify: (a) the default; (b) the action required to cure  
19 the default; (c) a date, not less than 30 days from the date the notice is given  
20 to Borrower by which the default must be cured; and (d) that failure to cure  
21 the default on or before the date specified in the notice may result in  
22 acceleration of the sums secured by this Security Instrument and sale of the  
23 Property. ... ***If the default is not cured on or before the date specified in  
24 the notice, Lender at its option may require immediate payment in full of  
all sums secured by this Security Instrument without further demand and  
may invoke the power of sale....***

25 If Lender invokes the power of sale, Lender shall give written notice  
26 to Trustee of the occurrence of an event of default and of Lender's election  
27 to cause the Property to be sold.

28 *See* Deed of Trust, Exhibit 2 to SAC, Doc. 12-5 at 70, ¶ 22.

On February 13, 2009, an Assignment of Deed of Trust was recorded, purporting to  
assign the Deed of Trust to IndyMac Federal Bank FSB, from Mortgage Electronic

1 Registration Systems, Inc., as Nominee for IndyMac Bank, FSB. *See* Exhibit 8 to SAC,  
 2 Doc. 12-6 at 60. Then, on February 17, 2009, an employee of Quality Loan Service  
 3 Corporation, Jim Montes, claiming to be an Assistant Vice-President with IndyMac  
 4 Federal Bank, substituted his employer QLS as trustee under the Deed of Trust. The  
 5 Substitution was recorded the same day. *See* Exhibit 11 to SAC, Doc. 12-6 at 67-68. Also  
 6 on February 17, 2009, Jim Montes, representing he is Assistant Vice-President of QLS,  
 7 signs the Notice of Trustee's Sale; the Notice is recorded that same day, setting the  
 8 trustee's sale to take place on May 19, 2009. *See* Exhibit 12 to SAC, Doc. 12-6 at 70-71.

9 The Statement of Breach or Non-Performance states that "[t]he Beneficiary elects to  
 10 sell or cause to be sold such property under the Trust Deed." *See* Exhibit 14 to SAC, Doc.  
 11 12-6 at 75. Therefore, Defendants declared the Note accelerated no later than February 17,  
 12 2009 when the Notice of Trustee's Sale was signed and recorded.

13 The Counterclaim admits that the entire balance of the Note was accelerated and  
 14 declared to be immediately due and payable. *See* Counterclaim (Doc. 14) ¶¶ 27, 46, 48.<sup>2</sup>

15 In March of 2010, Steinberger was offered a trial period plan ("TPP") under the  
 16 Home Affordable Modification Program. The TPP letter stated that even though  
 17 Defendant IndyMac Mortgage Services, a division of OneWest Bank was offering a trial  
 18 period plan, any pending foreclosure action would not be dismissed and no new notice of  
 19 acceleration would be necessary to continue the foreclosure action thereafter, if  
 20 Steinberger did not comply with the terms of the trial period plan. The TPP letter further  
 21 stated that, "[t]he servicer's acceptance and posting of your new payment during the trial  
 22 period will not be deemed a waiver of the acceleration of your loan or foreclosure action  
 23 and related activities, and shall not constitute a cure of your default under your loan unless  
 24 such payments are sufficient to completely cure your entire default under your loan." *See*  
 25 Exhibit 7 to SAC, Doc. 12-6 at 58.

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26  
 27 <sup>2</sup> Steinberger does not admit that Deutsche Bank as Trustee accelerated the Note, but the  
 28 identity of which entity purports to have accelerated the Note is irrelevant upon this  
 Motion.

Deutsche Bank as Trustee set forth the amounts alleged to be due and owing as of March 9, 2015:

Principal	\$576,109.56
Interest	\$121,265.40
Escrow Advance	\$ 27,107.94
Late Charges	\$ 8,659.34
Other Amounts	\$ 8,053.34
Suspense Credits	<u>\$ (1,906.00)</u>
Total	\$739,289.58.

See Counterclaim ¶ 50.

These allegations in the Counterclaim as well as documents attached to the Counterclaim and SAC, demonstrate that default occurred in 2008, and the entire Note balance was accelerated no later than February 17, 2009.

### III. LEGAL ANALYSIS.

#### A. The Standard on a Motion to Dismiss.

“To survive a motion to dismiss, a complaint must plead sufficient facts to state a claim for relief that is “plausible on its face.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). This “demands more than an unadorned, the defendant-unlawfully-harmed me accusation,” and more than “a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). It also “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. A complaint must assert factual allegations that “raise the right to relief above the speculative level” and cross the line from merely “conceivable” to a level “plausibly suggesting” a plaintiff is entitled to relief. *Id.* at 555-57. “Where a complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Iqbal*, 129 S. Ct. at 1949. Naked assertions devoid of further factual enhancement do not suffice. *Id.*

Courts will not assume a plaintiff can prove facts not alleged in a complaint, *see Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005), and courts are not “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Spreewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

The United States Supreme Court directs that federal courts in diversity matters must follow state court decisions on state law issues, even if those decisions are not from the highest court of the state, and even if the federal court does not agree with the decision. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37, 61 S.Ct. 179 (1940).

B. The Statute of Limitations Bars Any Action on the Note and any Foreclosure Whether Judicial, or Non-Judicial.

A federal court sitting in diversity applies the state statute of limitations when the suit is based on state-created rights. *Wester v. Crown Controls Corp.*, 974 F.Supp. 1284, 1285 (D.Ariz. 1996). Arizona statutes governing foreclosures provide the following limitation “on action or sale of trust property:”

The trustee’s sale of trust property under a trust deed shall be made, or any action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the contract secured by the trust deed.

A.R.S. § 33-816. Under Arizona law, the statute of limitations on an “[a]ction for debt shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward,” on a contract in writing, such as the Note. A.R.S. § 12-548(A). The Uniform Commercial Code also requires that an action on a Note must be brought within 6 years of the acceleration due date. A.R.S. § 47-3118(A). Therefore, any foreclosure is governed by the six-year limitation on a suit on the Note.

According to the Defendants and Counterclaimant Deutsche Bank as Trustee, the Note has been in default since November 1, 2008, and the payment default has never been

cured. *See, e.g.*, TPP Letter (Doc. 12-6 at 58); Notice of Trustee's Sale (Doc. 12-6 at 70-71); Statement of Breach or Non-Performance (Doc. 12-6 at 75); Counterclaim (Doc. 14 ¶¶ 27, 50). The Note was accelerated no later than February 17, 2009, when the Notice of Trustee's Sale was executed and recorded, because a trustee's sale cannot be initiated without accelerating the balance of the Note. *See* Doc 12-5 at 70 (Deed of Trust ¶ 22). Deutsche Bank as Trustee admits that the Note was accelerated. *See* Counterclaim (Doc. 14 ¶¶ 27, 48, 50).

A cause of action accrues as to future nondelinquent payments on a debt, when the full balance is accelerated. *Navy Federal Credit Union v. Jones*, 187 Ariz. 493, 495, 930 P.2d 1007, 1009 (Ct. App. 1996). Therefore, the six-year statute of limitations on the Note expired no later than February 16, 2015. Deutsche Bank as Trustee did not file its Counterclaim until March 23, 2015. The Counterclaim seeking to enforce the Note must be dismissed with prejudice; it is barred.

As set forth in A.R.S. § 33-816, an action to foreclose pursuant to a Note in default, is also governed by the six-year statute of limitations. *Accord, Atlee Credit Corp. v. Quetulio*, 22 Ariz. App. 116, 118, 524 P.2d 511, 513 (1974); *De Anza Land and Leisure Corp. v. Raineri*, 137 Ariz. 262, 266, 669 P.2d 1339, 1343 (Ct. App. 1983). The Court of Appeals recently reaffirmed the fact that a foreclosure is simply a way to collect a debt:

The debt arises from the promissory note. It is contractual.

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The Arizona statutes governing foreclosures, mortgages and deeds of trust are in accord with the interpretation that the contractual debt is foremost with any foreclosure or sale being secondary or merely a means of recovery on the original debt.

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The promissory note is the primary source of the debt. And, as the debt on the promissory note is primary, the foreclosure or trustee's sale is ancillary to the collection of the debt, not the other way around.

*National Bank of Arizona v. Schwartz*, 230 Ariz. 310, 312-313, 283 P.3d 41, 43-44 ¶¶ 7, 9 (Ct. App. 2012).



1 A Deed of Trust without a debt, secures nothing. "All the authorities agree that the  
2 debt is the principal thing and the mortgage an accessory. ... The mortgage can have no  
3 separate existence." *Carpenter v. Longan*, 83 U.S. 271, 275 (1872). The Arizona  
4 Supreme Court, concurs. "[A] deed of trust, like a mortgage, 'may be enforced only by, or  
5 in behalf of, a person who is entitled to enforce the obligation the mortgage secures.'"  
6 *Hogan v. Washington Mut. Bank, N.A.*, 230 Ariz. 584, 586, 277 P.3d 781, 783  
7 (2012)(quoting Restatement (Third) of Property (Mortgages) § 5.4 (c)). *See also, Hill v.*  
8 *Favour*, 52 Ariz. 562, 568, 84 P.2d 575, 578 (1938)(a mortgage is a mere incident of the  
9 debt, cannot be assigned separately, and distinct from the debt it secures, is not a thing of  
10 value; it is nugatory).

11 Because no one can enforce the Note, the Deed of Trust now secures nothing, and  
12 can be enforced by no one. Because the debt cannot be collected, a foreclosure cannot  
13 occur. The six-year statute of limitations has also run on the Deed of Trust in its own  
14 right. The statute of limitations has run on any individual or entity's ability to enforce the  
15 Note *or* Deed of Trust. The Counterclaim for foreclosure is barred; it must be dismissed  
16 with prejudice.

17 Because no individual or entity can foreclose either judicially or non-judicially  
18 pursuant to the Deed of Trust, Steinberger further respectfully requests that the Deed of  
19 Trust be ordered, released. The Counterclaim is not plausible on its face, because the  
20 statute of limitations has run on the Note and the Deed of Trust, rendering the Note  
21 unenforceable, and the Deed of Trust, a nullity.

22 Steinberger further requests her attorney's fees and costs in having to bring this  
23 motion, pursuant to A.R.S. § 12-341.01.

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**IV. CONCLUSION.**

Based on the foregoing, Steinberger respectfully requests that the Counterclaim be dismissed with prejudice, and this Court order and declare that no individual or entity having come forward to enforce the Note and Deed of Trust within the applicable statute of limitations, that neither can be enforced, and the Deed of Trust be ordered released from title. Steinberger further requests her attorney's fees and costs incurred herein.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of April, 2015.

**BARBARA J. FORDE, P.C.**

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